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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE LUIS GONZALES,

Defendant and Appellant.

G040155

(Super. Ct. No. 07CF1762)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kelly MacEachern, Judge. Affirmed in part, reversed in part, and remanded as directed.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Angela M. Borzachillo, Deputy Attorneys General, for Plaintiff and Respondent.

Joe Luis Gonzales appeals from a judgment after a jury convicted him of possession of ammunition by a prohibited person, street terrorism, and misdemeanor possession of controlled substance paraphernalia. Gonzales argues insufficient evidence supports his conviction for street terrorism, the trial court erroneously refused to instruct the jury with a pinpoint instruction, the prosecutor committed misconduct, and the court erroneously imposed and stayed a one-year prior conviction term. With the exception of his sentencing claim, none of his contentions have merit. We reverse his sentence and remand for further proceedings consistent with this opinion. In all other respects, we affirm the judgment.

### FACTS

Officers Kevin Ruiz and Jeff Launi executed a search warrant at 320 North Gunther Street in Santa Ana based on a citizen's report Gonzales was selling drugs from his home and had displayed weapons, and there was gang activity. Ruiz knew Gonzales to be one of the older members of the "Santa Nita" gang and his moniker was "Big Joe."

The Gunther Street property included a residence in the front and a two-story structure in the back. The upper level, 322 ½ Gunther Street, was Gonzales's residence, and the lower level was partitioned into two residences.

In Gonzalez's residence, Ruiz found him in the northwest bedroom with a woman. Gonzalez's speech was slurred, his pupils were constricted, and his lips were dry, which led Ruiz to believe he was under the influence of an opiate. Inside the bedroom, officers found the following: syringes; two bottom portions of soda cans containing burnt residue; and cotton with a dark liquid residue. In the adjacent bathroom, they found a pipe and a syringe.

Inside the southwest bedroom, officers found a glass pipe, a piece of aluminum foil with burnt residue, two pieces of cellophane, sky or baby blue items, three letters, a deposition transcript, two police citations with Gonzales's name, Gonzales's

wallet, and a piece of wood that read ““Big Joe SNR[.]”” Ruiz also found a set of keys that matched a Ford Explorer parked in front of the house.

Officers found a spoon, cotton, and a straw inside another bedroom. In the living room, officers found a spiral notebook that contained Santa Nita gang graffiti and two compact disks adorned with Santa Nita gang graffiti and the words ““Big Joe.”” There were baby blue items hung on the walls.

Ruiz gave the car keys to Launi who gave them to Investigator Hector Rios. In the vehicle, Rios found a box of bullets under the rear seat. Rios inserted the key into the ignition and the stereo turned on. Officers found a revolver in the garage.

An information charged Gonzales with possession of ammunition by a prohibited person (Pen. Code, § 12316, subd. (b)(1))<sup>1</sup> (count 1), street terrorism (§ 186.22, subd. (a)) (count 2), and misdemeanor possession of controlled substance paraphernalia (Health & Saf. Code, § 11364) (count 3). The information alleged Gonzales suffered three prior convictions (May 1988, July 2005, and October 2005) within the meaning of section 667.5, subdivision (b).

At trial, the prosecutor offered the testimony of Ruiz, a gang expert. After detailing his background, training, and experience, Ruiz testified concerning the culture and habits of traditional, turf-oriented, Hispanic criminal street gangs. He provided the legal definition of a criminal street gang and explained gangs have a common sign or symbol and a color. He also explained how a person joins a gang and the act of ““claiming,”” or admitting membership in a gang, either verbally or non-verbally through gang tattoos, wearing the gang’s colors, or ““flashing”” the gang’s sign. He stated traditional Hispanic gangs are territorial, which means the gang controls a defined territory through violence and intimidation. He also said criminal street gangs have both allies and rivals. Ruiz stated respect is extremely important to criminal street gangs and

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<sup>1</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

gang members and they earn respect by committing violent acts and instilling fear in their territory. He explained guns are important in gangs because it allows gang members to commit violent acts and earn respect. He said a “gang gun” is a gun used by gang members to commit violent acts and gang members give the gun to fellow gang members to commit crimes and to avoid detection.

Ruiz provided the history of Santa Nita, from Dramatics car club to Santa Nita criminal street gang—its symbols were “SN,” “SNR,” or “DSN” with a top hat and cane, and its primary color was sky or baby blue. He testified concerning Santa Nita’s primary activities, including robbery, automobile theft, and carjacking, the predicate offenses, and its membership. Ruiz opined Gonzales was an active participant in Santa Nita at the time of the search of his home based on the following: Gonzales’s presence at the scene of a fellow Santa Nita gang member’s death; his presence, adorned in baby blue, in Santa Nita claimed territory with an admitted Santa Nita gang member where he claimed associating with Santa Nita gang members since 1972; information he organized a meeting to “jump in” new Santa Nita gang members; his tattoos; and all the items officers discovered during the search of his home. Additionally, when the prosecutor offered Ruiz a hypothetical question mirroring the facts of this case, Ruiz opined using a residence as a “gang hangout” would assist, further, and benefit the gang. He also opined possession of ammunition would benefit the gang because when paired with a gun, a gang member could commit violent acts and thereby earn respect for himself and the gang. Based on his training and experience, Ruiz also opined that items found in Gonzales’s residence were used to ingest or inhale controlled substances.

Gonzales testified on his own behalf and stated he had recently returned to his childhood home on Gunther Street after living in Corona for the previous 20 years. Gonzales stated he has a Santa Nita tattoo because that is where he was born and raised. He denied ever being in a criminal street gang or hearing of Santa Nita criminal street gang. Gonzales explained his vehicle was inoperable and at one point parked at a

neighbor's house for weeks. He said the ammunition was not his, he had never seen it, and he did not own a .357 Magnum handgun. He stated the garage was locked, his brother had the key, and he had not been inside the garage for two weeks. Gonzales claimed one of his friends used heroin and his brother was a diabetic. He had never seen the pipe or foil and did not know where they came from.

Gonzales offered the testimony of a childhood friend and neighbor, Carlos Casanova. He confirmed much of what Gonzales described about his vehicle. Gonzales also offered the testimony of his brother, Desi Gonzales. He confirmed much of what Gonzales stated about their brother's diabetes. With respect to the garage, he said the garage was generally locked and he had the key, but he did not know if it was locked at the time of the search because he was not at the house. He added Gonzales did not have a key, but he occasionally unlocked the garage and let Gonzales enter. On cross-examination, he admitted the garage's back window was broken and he suspected people had been in the garage.

The jury convicted Gonzales of all counts. After a bifurcated trial where Gonzales admitted his prior convictions, the trial court sentenced Gonzales to four years in prison as follows: the middle term of two years on count 1 and two, one-year terms on the 2005 prior convictions. The court stayed sentencing on counts 2 and 3, and imposed and stayed the one-year term on the 1988 prior conviction.

## DISCUSSION

### *I. Sufficiency of Evidence-Street Terrorism*

Gonzales argues insufficient evidence supports his conviction for street terrorism because there was no evidence "any criminal activity by [Gonzales] was designed to assist, further, or promote felonious criminal conduct by members of the Santa Nita gang." Not so.

““To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to

determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.”” [Citations.] ““If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.”” [Citations.] The standard of review is the same when the prosecution relies mainly on circumstantial evidence. [Citation.]” (*People v. Valdez* (2004) 32 Cal.4th 73, 104 (*Valdez*).)

Section 186.22, subdivision (a), states: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . in the state prison for 16 months, or two or three years.”

Section 186.22, subdivision (a), “punishes active gang participation where the defendant promotes or assists felonious conduct by the gang. It is a substantive offense whose gravamen is the participation in the gang itself.” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, fns. and italics omitted.) Because the gravamen of the crime is gang participation, it follows that the offense ““applies to the perpetrator of felonious gang-related criminal conduct . . . .”” (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

Preliminarily, Gonzales does not seriously dispute his conviction on count 1, i.e., that there was sufficient evidence he feloniously possessed the ammunition in the vehicle. To the extent he does contest the quantum of evidence on this point, if at all, there was sufficient evidence he unlawfully possessed the ammunition in the vehicle—the vehicle was his, the keys were in his bedroom, and there was a box of ammunition hidden under the rear seat. And, officers found a .357 Magnum in his garage. After initially equivocating over whether the garage was locked, Gonzales’s

brother testified it was locked and Gonzales did not have a key. But he also testified he let Gonzales in the garage and the garage window was broken and he believed someone had been inside the garage. Based on all the evidence, the jury could reasonably infer Gonzales, who lived at the residence and had access to the garage constructively possessed the gun in the garage.

Ruiz testified a “gang gun” is a gun used by gang members to commit violent acts and they routinely pass the gun to fellow gang members to commit crimes and to avoid detection. He also stated that without ammunition, a gun is useless. Finally, he opined that possession of ammunition would benefit the gang because when paired with a gun, a gang member could commit violent acts and thereby earn respect for himself and the gang. Based on his investigation of this case and his experience with the Santa Nita criminal street gang, Ruiz believed Gonzales to be an active participant in the Santa Nita criminal street gang at the time of the search, a point which Gonzales does not dispute. Nor does he dispute he knew Santa Nita gang members engage in or have engaged in a pattern of criminal gang activity.

The record includes sufficient evidence for the jury to reasonably infer Gonzales, a Santa Nita gang member, constructively possessed the gun in the garage and feloniously possessed the ammunition in the vehicle to assist, further, or promote felonious criminal conduct by Santa Nita gang members. Gonzales’s reliance on the fact there was no evidence establishing the gun and the ammunition were the same caliber to support his claim is unpersuasive as it would require us to reweigh the evidence and substitute our judgment for the jury’s, which we cannot do. (*Valdez, supra*, 32 Cal.4th at p. 104.) Therefore, there was sufficient evidence for the jury to convict Gonzales of count 2.

## *II. Special Instruction*

Gonzales contends the trial court erroneously refused his special instruction concerning possession of a controlled substance or contraband because substantial evidence supported the instruction, the instruction accurately stated the law, and alternatively, if the court believed it was inaccurate, the court should have modified the instruction. As we explain below, the jury instructions properly and completely stated the applicable legal principles.

“‘We have suggested that “in appropriate circumstances” a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case. . . . But a trial court need not give a pinpoint instruction if it is argumentative [citation] [or] merely duplicates other instructions [citation] . . . .’ [Citation.]” (*People v. Ramirez* (2006) 39 Cal.4th 398, 470.) The adequacy of jury instructions is considered by examining the charge as a whole. (*People v. Holt* (1997) 15 Cal.4th 619, 677 (*Holt*).) In assessing whether jury instructions correctly state the law, we review the instructions de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

After the trial court instructed the jury, defense counsel requested the court instruct the jury further with a special instruction on possession. Defense counsel requested the court “add . . . language to the effect that access to an area where a controlled substance or contraband is found is insufficient for purposes of possession.” The court refused the request explaining the instructions given “thoroughly and completely explain” the applicable legal principles.

The trial court instructed the jury with Judicial Council of California Criminal Jury Instructions (2008) CALCRIM Nos. 2591, “Possession of Ammunition by Person Prohibited from Possessing Firearm,” and 2410, “Possession of Controlled Substance Paraphernalia.” CALCRIM No. 2591 required the jury to find Gonzales *knowingly* owned, possessed, or had under his custody or control ammunition. CALCRIM No. 2410 required the jury to find he *knowingly* possessed an object that



could be used to unlawfully inject or consume a controlled substance. And the trial court instructed the jury it had to find these elements beyond a reasonable doubt (CALCRIM No. 103). These instructions precluded the jury from convicting Gonzales based on a finding he had *access* to the ammunition and paraphernalia. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.) The jury was required to find beyond a reasonable doubt he knowingly possessed these items. ““We presume that jurors understand and follow the court’s instructions’ [citations]. . . .” Although stated differently, the special instruction was duplicative of the trial court’s instructions, and was not “additive” as Gonzales suggests.

With respect to Gonzales’s contention that if the trial court considered the special instruction argumentative or incomplete, the court was required to modify the special instruction, we disagree. The court did not find the special instruction argumentative or incomplete—the court concluded it was duplicative. There was no need for the court to modify the special instruction where the instructions given properly and completely explained the applicable legal principles. Finally, defense counsel had the opportunity during closing argument to highlight Gonzales’s defense he was unaware of the presence of the prohibited items. Therefore, based on all the jury instructions, we are confident the jury did not convict Gonzales of counts 1 and 3 based solely on the finding he had *access* to the prohibited items.

### *III. Prosecutorial Misconduct*

Gonzales claims the prosecutor committed misconduct during cross-examination when the prosecutor asked him to vouch for Ruiz’s credibility. As we explain below, Gonzales waived appellate review of this contention because his defense counsel did not object and request an admonition. Additionally, we conclude he was not prejudiced by counsel’s performance.

### *A. Prosecutor's Cross-Examination of Gonzales*

Ruiz testified the Dramatics car club evolved into the Santa Nita criminal street gang and its symbols were “‘SN,’” “‘SNR,’” or “‘DSN’” with a top hat and cane.

During the prosecutor's cross-examination of Gonzales the following colloquy occurred:

“[Prosecutor]: As to your other tattoo that says ‘DSN’ and has a top hat and a cane, the top hat and the cane stand for Dramatics; right?”

“[Gonzales]: Yes.”

“[Prosecutor]: And DSN is Dramatics Santa Nita; right?”

“[Gonzales]: Yes.”

“[Prosecutor]: So when . . . Ruiz said ‘That’s what it stands for,’ he was right; that’s what it stands for?”

“[Gonzales]: Yes.”

### *B. Waiver*

“‘In order to preserve a claim of [prosecutorial] misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review. [Citation.]’ [Citation.]” (*People v. Parson* (2008) 44 Cal.4th 332, 359.) Here, Gonzales’s defense counsel did not object to the prosecutor’s question and request an admonition, and therefore, his claim is waived. However, Gonzales’s also asserts his defense counsel was ineffective for failing to object and request an admonition. We will address his claim within that context.

### *C. Ineffective Assistance of Counsel*

“If defendant fails to show that he was prejudiced by counsel’s performance, we may reject his ineffective assistance claim without determining whether counsel’s performance was inadequate. [Citation.]” (*People v. Sanchez* (1995)

12 Cal.4th 1, 40-41, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Here, Gonzales suffered no prejudice because it is not reasonably probable the result of the proceeding as to count 2 would have been different had his defense counsel objected to the complained of statement and requested an admonition. Ruiz testified “DSN” stood for Dramatics Santa Nita. Gonzales confirmed this. Even had Gonzales not confirmed Ruiz was correct, we are confident beyond a reasonable doubt the result would have been the same because as we explain above, there was sufficient evidence for the jury to convict Gonzales on count 2. And Gonzales admitted he was a member of the Dramatics car club and he had Santa Nita tattoos because he was proud of the neighborhood where he grew up. The jury apparently rejected his explanation outright and Gonzales’s contention his confirmation of Ruiz’s testimony contributed to his conviction on count 2 is meritless.

#### *IV. Prior Conviction Sentence Enhancement*

Gonzales contends the trial court erroneously imposed and stayed the one-year sentence on his 1988 prior conviction and therefore we should order it stricken and direct the court clerk to prepare a new abstract of judgment. The Attorney General concedes the trial court erred but asserts we should remand the matter for the trial court to exercise its discretion pursuant to section 1385. We agree the trial court erroneously stayed the sentence and conclude the matter must be remanded.

A trial court may either impose or strike a sentence enhancement pursuant to section 667.5, subdivision (b). (*People v. Haykel* (2002) 96 Cal.App.4th 146, 151.) However, the court may not stay such an enhancement and to do so is an unauthorized sentence. (*Ibid.*) Therefore, the trial court erroneously stayed the one-year sentence on the 1988 prior conviction. Thus, we are left with the proper remedy.

Section 1385, subdivision (a), authorizes the trial court to strike a prior prison term enhancement upon reasons stated. (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516, fn. 3.) Here, the record is silent as to the trial court's reasons, and we remand the matter for resentencing for further proceedings consistent with this opinion.

#### DISPOSITION

We reverse Gonzales's sentence and remand for further proceedings consistent with this opinion. In all other respects, we affirm the judgment.

O'LEARY, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.